No. 2[illegible]

In the
Supreme Court of the United States

OCTOBER TERM, 1961

PORT ANGELES AND WESTERN RAILWAY COMPANY
and A. R. TRUAX, Trustee in Reorganization
and FIBREBOARD PRODUCTS, INC., *Petitioners*,

v.

ARTHUR A. ARNHOLD, *et al.*, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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THE ARGUS PRESS SEATTLE, WASHINGTON

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No.....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

The judgment below relates to a tort action involving a large forest fire in the Olympic mountains of the State of Washington in which the district judge found in favor of petitioners and of the United States of America (under the Tort Claims Act, 28 U.S.C. Secs. 2671-2680, sec. 1346(b); 62 Stat. 933, 982). The Circuit Court reversed the district judge with instructions to enter judgment against petitioners by reason of the negligence of the United States of America, purporting to "interpret" the findings of the district judge in such a way as to reach a result opposite to that reached

by the district judge. Motions for a rehearing and remanding of the case to the district judge for a clarification of his findings were denied with a dissenting opinion by one judge.

This is the only case found by petitioners which has been tried in the federal courts involving the liability of the federal government and other parties derivatively for the negligence of the federal government in fighting forest fires.

OPINIONS BELOW

The District Judge rendered a Memorandum Opinion, with amendments, and written Findings of Fact and Conclusions of Law, and a Judgment, which are set forth respectively in the Transcript of Record (R. 171, 238; 205, 227; and 215), and which is reported in 166 F. Supp. 373.

The opinion of the Court of Appeals is printed as Appendix A. hereto and is reported in 284 F.2d 326. The order of the Court of Appeals denying petitions for rehearing and remanding is printed as Appendix B hereto and is reported in 289 F.2d 924. The judgment of the Court of Appeals is printed as Appendix C hereto.

JURISDICTION

The opinion of the Court of Appeals was entered October 26, 1960, and the order denying petitions for rehearing is dated and was entered on May 10, 1961.

Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

The statutes pertinent to this petition are 16 U.S.C. Sec. 572 pursuant to which the Forest Service of the United States of America was authorized to enter into a cooperative agreement with petitioners and others under Revised Code of Washington Sec. 76.04.400, 76.04-.060, and 76.04.070, whereby the United States of America assumed the duty, power or right to control forest fire fighting activities in the area involved in this cause. All the foregoing statutes are set forth in Appendix D.

QUESTIONS PRESENTED

1. Where a circuit court was admittedly in doubt as to the meaning of the significant findings of the district judge, should the circuit court overturn the judgment entered by the district judge without remanding the cause, thus depriving the district judge of the opportunity and litigants of the right to obtain a clarification and amplification of such findings by the district judge?

2. Does the refusal of the circuit court to apply the law of the State of Washington that liability does not rest in the negligent act, but upon proof that the act of negligence was the proximate cause, violate the duty of the circuit court to follow applicable state law?

3. Was the failure of the Circuit Court to follow the District Court's specific finding that the negligence of the Government was committed on August 6 and 7 and only while fighting the fire which was still wholly on Government land an interference with the fact finding function of the trial judge and, hence, a departure from the accepted and usual course of judicial proceedings?

4. Fibreboard and the railroad were involuntary members of the cooperative agreement and had a statutory right and duty to rely upon, and no right to interfere with, the control of the fire fighting assumed by the government under that agreement. Did the Circuit Court disregard applicable state law by holding Fibreboard and the railroad liable solely upon the negligence of the government?

STATEMENT OF THE CASE

This action was brought against petitioners and the United States to recover damages for property loss sustained by the respondents in a disastrous forest fire covering thousands of acres on the Olympic Peninsula in the State of Washington.

The case was tried to the court in an extensive trial lasting over two months, involving the testimony of 32 witnesses and some 4600 pages of transcript, and a tour of the fire area by the judge. On June 23, 1958, following conclusion of trial, the district judge filed a memorandum opinion (R. 171-205). On July 1, 1958, the judge filed findings of fact and conclusions of law. (R. 205-215). On July 10, 1958, judgment was entered dismissing the actions with prejudice (R. 215-217).

On July 18, 1958, the respondents filed a motion to amend the findings of fact, conclusions of law and judgment (R. 219-224, 473-479). On September 16, 1958, the court entered an order amending its previously filed memorandum opinion (R. 238-241) and Findings of Fact and Conclusions of Law (R. 227-237).

The judgment of the district judge dismissing respondents' actions was based upon the determination of the court that the damage to respondents' property was not proximately caused by the negligence of petitioners or the United States, and that the "sole proximate cause of the damages to plaintiffs in the amount stipulated herein [approximately $300,000.00] was the unforseeable and fortuitous combination of wind and weather conditions." (R. 213).

Upon appeal, the circuit court reversed and directed that judgment be entered against the United States by reason of the negligence of the Forest Service in fighting the forest fire. Petitioners were held liable solely because of the negligence of the United States. This decision was based upon an interpretation of the trial judge's findings. The language of the circuit court decision clearly indicates that the court was in doubt as to the meaning of certain crucial findings of the trial judge.

On May 10, 1961, petitions for rehearing were denied despite the admission of one judge of the substantiality of such doubt.

JURISDICTION OF DISTRICT COURT

The district court had jurisdiction over the subject matter of and the parties to this action under 28 U.S.C. secs. 1331, 1346(b) and 2671-80, commonly known as the Federal Tort Claims Act (R. 3, 171, 172; 236; 243) with respect to the United States of America, and under 28 U.S.C. sec. 1332 by reason of diversity of citizenship with respect to the petitioners (R. 172, 228, 229, 236).

REASONS FOR GRANTING THE WRIT

1. Where a circuit court was admittedly in doubt as to the meaning of significant findings of the district judge, should the circuit court overturn the judgment entered by the district judge without remanding the cause, thus depriving the district judge of the opportunity and litigants of the right to obtain a clarification and amplification of such findings by the district judge?

The United States Court of Appeals for the Ninth Circuit reversed the holding of the District Court only after stating that:

(a) "We do not believe that the district judge could ever have intended to make any such finding."

This referred to the clear findings of fact that no causal relationship existed between the initial lack of due care of the United States and the damages to respondent (Finding XVI, R. 234-5); and that the sole proximate cause was the fortuitous combination of wind and weather conditions which occurred on September 20 (Finding XVIII, R. 235-236).

(b) "* * * When the district court finds District Ranger Floe to be initially 'negligent,' we take it he means not negligent in the abstract, but negligent in the sense that such negligence subjected appellants' property to an unreasonable risk of fire loss."

There was ample evidence to support the crucial findings of fact in (a), and they were entirely consistent with the other findings of fact and conclusions of law of the district judge. Thus, in regard to those findings of fact, and although cloaking its action by

suggesting that it had divined the district judge's "intent," the Court of Appeals overrode a fundamental and unambiguous finding of fact, contravening the principles of normal appellate jurisdiction. Where a district court tries a case without a jury, its findings upon questions of fact are conclusive in courts of review, unless clearly erroneous. *State Farm Insurance v. Coughran*, 303 U.S. 485, 82 L.Ed. 970 (1938); *United States v. Jefferson Electric Manufacturing Co.*, 291 U.S. 386, 78 L.Ed. 859 (1934); *Dooley v. Pease*, 180 U.S. 126, 45 L.Ed. 457 (1901); *Davis v. Schwartz*, 155 U.S. 631, 39 L.Ed. 289 (1894); *Martinton v. Fairbanks*, 112 U.S. 670, 28 L.Ed. 862 (1885); *The Hypodame v. Chapin*, 6 Wall. 216, 18 L.Ed 794 (1868). This is so when the judgment of the trial court is couched in terms of a general verdict, and particularly so when detailed findings of fact support the conclusions of law, as in this case. *United States v. Jefferson Electric Manufacturing Co.*, 291 U.S. 386, 78 L.Ed. 859 (1934).

The effective overruling of the fundamental findings of fact by the Circuit Court here is a travesty that cannot be masked or justified by saying that the district judge could not have "intended" his unambiguous findings. Even if an ambiguity could be found that would allow arguments of intent to be intruded, the proper course would be to remand to the district judge to allow clarification of such ambiguity.

Remand was also clearly indicated by the ambiguity found by the Circuit Court in the finding of fact set out at (b). As was stated by Judge Pope in his dissent from denial of petitions for rehearing (Appendix B),

> "* * * as our opinion discloses, we had some difficulty in interpreting the findings of the district court and to a degree we modified them or put our own interpretation upon them."

In the opinion, the Circuit Court "take(s) it" that "negligent" as used in the finding set out at (b) means a lack of due care in terms of the damage which finally took place, when it is more persuasive that the trial judge's use of the term indicates a finding of an initial lack of due care which did not cause the damages.

This latter interpretation is much more consistent with the other findings of fact of the trial judge and with the disregarded Washington cases defining negligence in the latter sense. The proper action of the Circuit Court in the face of such an ambiguity was not to impose its own interpretation on the finding, particularly when the whole liability of the defendants rested upon that and related findings, but to remand to the District Court for amplification or clarification. Before the trial, District Judge Boldt spent two days traveling through and inspecting the far-flung mountainous area affected by the fire. There is no substitute for the background thus acquired, particularly in a fire in a rugged terrain. The failure of the Circuit Court to remand for clarification, as urged by Judge Pope, was a clear departure from the accepted and usual course of judicial proceedings, calling for the exercise of supervision of the United States Supreme Court.

2. The law of the State of Washington is that liability does not rest in the negligent act, but only upon proof that the act of negligence was the proximate cause. Does the refusal of the Circuit Court to apply this law, as recognized by the trial judge, violate the duty of the Circuit Court to follow applicable state law?

It is necessary in the State of Washington not only to prove negligence, but to show that the negligence in question was the proximate cause of the ultimate injury. *Udhus v. Peglow*, 55 Wn.2d 846, 350 P.2d 640 (1960). Proximate cause is defined by the Washington court as "that cause which, in natural and continuous sequence, unbroken by any new independent cause, produces the event, and without which the event would not have occurred." *Eckerson v. Ford's Prairie School District*, 3 Wn.2d 475, 101 P.2d 345 (1940).

The Circuit Court states that it was unable to cite any Washington cases using proximate cause "somewhat arbitrarily to cut off a liability that would otherwise rest upon a negligent actor." However, the only cases in Washington whose fact situations are directly in point hold that sudden and unexpected winds of high velocity which intervene to cause damage, notwithstanding efforts to contain or extinguish a fire, are a new, efficient intervening cause making ineffective and remote any prior negligence in fighting the fires. *Walters v. Mason County Logging Co.*, 139 Wash. 265, 246 Pac. 749 (1926); *Lehman v. Margott & Spencer Logging Co.*, 108 Wash. 319, 184 Pac. 323 (1919); *Stephens v. Mutual Lumber Co.*, 103 Wash. 1, 173 Pac. 1031 (1918).

Contrary to the explicit assumption in the Circuit

Court opinion, Washington, like New York, has consistently insisted the plaintiff has the burden of proving proximate cause, and when he fails to do so, as in this case, he cannot recover. In disregarding this body of state law, the Circuit Court violated the philosophy of *Erie Ry. v. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188 (1938). The parties hereto are entitled to a decision based upon Washington law.

3. Was the failure of the Circuit Court to follow the District Court's specific findings that the negligence of the Government was committed on August 6 and 7 and only while fighting the fire which was still wholly on Government land an interference with the fact finding function of the trial judge and, hence, a departure from the accepted and usual course of judicial proceedings?

The Circuit Court stated in its opinion that:

> "The district court found the Forest Service negligent 'in its fire fighting action during the initial period August 6-10, in which interval the fire reached Fibreboard lands. . . ."

having apparently taken this time period from the district court's memorandum opinion, R. 191, 192, wherein the court arbitrarily grouped certain time periods of the fire for discussion purposes. The period of August 6-10 was the period frequently referred to by the trial court and counsel as a convenience, because it was the period within which the 60 acre Heckelville fire was contained within the 1600 acre area. The Circuit Court seized upon these dates, overlooking the fact that subsequent to the memorandum decision the district court entered specific Findings of Fact and Conclusions of Law and amended Findings of Fact and Conclusions

of Law in which it found that the negligence of the Government committed within the initial period was confined to August 6 and 7 and only while fighting the fire then entirely on Government land and before the fire came onto Fibreboard land. This is made clear in Amended Finding XVII, R. 235, and Amended Conclusion IV, R. 237:

> "Plaintiffs did not show by a preponderance of the evidence that defendant United States failed to use reasonable care in mop-up or other firefighting activities after August 7, . . ." (Amended Finding XVII)
>
> "Defendant United States was negligent in failing to use reasonable care in fighting the Heckleville fire on August 6 and 7." (Amended Conclusion IV)

The foregoing quotation emphasizes the trial judge's finding that the negligence of the Government occurred only on August 6 and 7, while the fire was on Government land consisting of the 60 acre Heckleville fire area.

The trial judge's later comment, made during one of the post-trial arguments, R. 292, shows his intent to find that the Government's negligence within the initial period was limited to the dates August 6 and 7, before the fire invaded Fibreboard lands:

> "THE COURT: I am concerned with whether I have used the right language to express what I found and believe. I am satisfied that the Forest Service in what I call 'the initial fire period,' August 6, 7, did not act as promptly and fully and effectively as reasonable care required."

If the Circuit Court had any doubt of the intention of the trial court in the face of these comments and specific findings it should have followed the simple expedient of remanding for clarification on the point.

4. Fibreboard and the railroad were involuntary members of the cooperative agreement and had a statutory right and duty to rely upon, and no right to interfere with, the control of the fire fighting assumed by the Government under that agreement. Did the Circuit Court disregard applicable state law by holding Fibreboard and the railroad liable solely upon the negligence of the Government?

Fibreboard had no choice but to become a member of the cooperative agreement and to allow the Forest Service to act as described by this court in *Rayonier, Inc. v. United States,* 352 U.S. 315, where it is said:

> "Shortly after the fire started United States Forest Service personnel appeared and took exclusive direction and control of all fire suppression activities."

The Court's concept of a non-delegable duty of a landowner and occupier in these circumstances is in conflict with Washington law.

Prior to 1929 the forestry laws of Washington specified what the landowner or occupier was to do on his own responsibility. Present statutes place the authority with the state fire wardens whose directions must be obeyed by the landowner. Specifying the duties of wardens, RCW 76.04.060 and RCW 76.04.070 require them to investigate all fires and "summon, impress and employ help in controlling fire." By impressing the employees of Fibreboard into their fire fighting ranks, the government assumed the responsibility for the abatement of the fire, a duty particularly prescribed for "uncontrolled fire" in RCW 76.04.380.

The whole philosophy of the present forestry laws

is entirely contrary to the old philosophy placing the responsibility of judgment on the shoulders of the landowner. The philosophy of the present law is that the public officials take care of the forest and supervise any fire fighting necessary. Under the present statutes the standard of due care is prescribed to be the judgment of the state supervisor of forestry. The Forest Service was acting in place of the state fire warden by virtue of the terms of the coperative agreement authorized by RCW 76.04.400 and 16 U.S.C. 572, which latter statute is intended to protect Forest Service land.

Neither petitioners nor any other members of the cooperative agreement had any right, duty or power to control the activities of the Forest Service in its fire suppression efforts. By the terms of the cooperative agreement and the state statutes, the Forest Service was empowered to and did summon, impress and employ men and equipment of parties to the agreement into its service. Thereafter, those non-government employees were as powerless to countermand Forest Service orders as is a conscript to change the orders of his commanding officer.

The district court's specific finding XIV, R. 212, and finding XV, R. 234, that:

> "Plaintiffs did not show by a preponderance of the evidence that defendant Fibreboard failed to use ordinary care in any of the particulars of negligence alleged by plaintiffs."

was not clearly erroneous and should not have been disturbed.

It was never suggested prior to the Circuit Court opinion that Fibreboard, the railroad, or any other member of the cooperative agreement, was liable because of the Government's alleged negligence in performing its duties under that cooperative agreement.

In holding Fibreboard and the railroad liable for or because of the Government's negligence the Circuit Court injects a theory into the case that had not heretofore been asserted or contended for by any party. This matter was not considered by the District Court, because there was no issue before it on this point. It is well settled that a new issue should not be injected into the case by the reviewing court to support a reversal as distinguished from an affirmance of the district court. To hold otherwise would subject a litigant to liability on a theory against which it had no opportunity to defend. This issue should not have been raised by the Circuit Court for the first time in the history of this litigation without giving petitioners and the trial judge an opportunity to consider it.

Apart from the impact upon petitioners, the Circuit Court's decision produces uncertainty and creates unintended and far-reaching implications of liability for the states and many large and small timber owners who seek to minimize the risk of forest fires under cooperative fire fighting agreements. In its laudable desire to protect national forests by the enactment of 16 U.S.C. 572, Congress did not intend to impose new and far-reaching liabilities upon states and individual timber owners who might enter into cooperative agreements with the federal government

in order to accomplish this objective. This is true regardless of the fact that the responsibility of the federal government was thereby enlarged. The resulting liability of the government in this case for its own negligence should not be extended to petitioners and countless other private owners. This unintended result is of concern to all timber owners in or near national forests and naturally could not be raised by the government or the plaintiffs in this case. Even Rayonier, who the Circuit Court said had a right to rely upon the government's assumption of this duty, is potentially hurt by the impact of the Circuit Court's opinion creating this new liability on private owners.

If the Circuit Court opinion were to become the law, thereafter every member of a cooperative agreement across or upon whose lands the Government fights a forest fire will be responsible for the negligence of the Government without being able to do anything about it. The obvious effect of the Circuit Court opinion on the "public interest" referred to in 16 U.S.C. 572 requires review by this court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:
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August 3, 1961.

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APPENDIX A

OPINION OF COURT OF APPEALS
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARTHUR A. ARNHOLD, et al., *Appellants*, vs. UNITED STATES OF AMERICA, et al., *Appellees*.	No. 16,367
RAYONIER INCORPORATED, a corporation, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee*.	No. 16,368 Oct. 26, 1960

Appeals from the United States District Court
for the Western District of Washington,
Northern Division

Before: POPE, MAGRUDER and MERRILL, Circuit Judges.

MAGRUDER, Circuit Judge.

This litigation arose out of a forest fire in August and September, 1951, on the Olympic Peninsula in the State of Washington.

A complaint was filed under the Tort Claims Act by Rayonier Incorporated, one of the property owners who suffered loss, against the United States of America as sole defendant, charging negligence by employees of the United States in their failure to prevent, control, and extinguish the forest fire. This case is now our No. 16368.

A separate and distinct complaint was filed by Arnhold, and others, whose property was destroyed in the same fire, against the United States of America under the Tort Claims Act, and also, by reason of diversity of citizenship against the Port Angeles and Western Railroad Company, and Fibreboard Products, Inc., one of the owners of land through which the fire spread. Certain insurance companies were added as "additional plaintiffs" in this our No. 16367.

These cases were here on an earlier appeal. At first the district court entered judgment dismissing the complaints as being insufficient in their allegations, and we affirmed, in *Rayonier Inc. v. United States,* 225 F.2d 642 (9th Cir. 1955), and in *Arnhold et al. v. United States,* 225 F.2d 650 (9th Cir. 1955). However, the Supreme Court granted certiorari, and setting us right on our misapprehension of the meaning of certain language in *Dalehite v. United States*, 346 U.S. 15 (1953), vacated our judgments and remanded the cases to the district court with directions to consider the complaints anew "wholly free to determine their sufficiency on the basis of whether the allegations . . . would be sufficient to impose liability on a private person under the laws of the State of Washington." *Rayonier Inc. v. United States*, 352 U.S. 315, 321 (1957).

The two cases were consolidated by the district court for trial. After filing an elaborate opinion and various findings, which were later revised somewhat, the district court entered judgments again dismissing the complaints. Counterclaims by the United States against Rayonier Incorporated and the Port Angeles and Western Railroad Company were dismissed at the same time, but the United States has taken no appeal from this aspect of the judgments and these matters are not before us.

Separate appeals were taken by the losing parties from the above judgments. These appeals were heard by us together and the cases may be disposed of by a single opinion. In the view we take, it is not necessary to go behind the district court's findings of fact.

The fire in question broke out in the Soleduck District. In that district was situated the headquarters of Forest Service District Ranger Floe, who was the government's chief fire control officer in the area. The United States of America entirely owned sixty acres south of the town of Heckelville. Through the top of this 60-acre tract ran the tracks of the Port Angeles and Western Railroad. The railroad's right of way was actually in the railway's possession under executory contracts of sale from the defendant, the United States of America. About noontime on August 6, 1951, a locomotive operated by the defendant railroad started on its right of way in the 60-acre tract the so-called Heckelville spot fire. This fire spread to a 1600-acre area owned in part by the United States and in the remaining part by the defendant Fibreboard Products, Inc. The fire swept through this 1600-acre tract and eventually expanded to destroy the Rayonier property many miles away and also the property of the various plaintiffs in our No. 16367.

Under the Federal Tort Claims Act, we have to determine whether the United States, if it had been a private party, would have been liable for the various losses under Washington law. The amount of these losses has been stipulated and is not now in dispute.

In this connection, we need not rely upon any affirmative obligation of the United States, as legal owner of the right of way, to go upon the right of way of the railroad to suppress the Heckelville fire as soon as it started. But it is the law of Washington, as it is the

law generally, that a land occupier has an affirmative obligation to use care to confine any fire on his premises, regardless of its origin, in favor of all persons off his premises who are subjected thereby to an unreasonable risk of damage due to escape of the fire. In addition, in this case the United States had entered into a cooperative agreement, under 16 U.S.C. § 572 and R.C.W. 76.04.400, whereby the United States had undertaken to protect all non-United States owned land in the region from fire and to take "immediate vigorous action" to control all fires breaking out in the protected area.

This agreement, which was relied upon by Rayonier and by others, would be the basis of an affirmative obligation of the United States to use care in the premises if there were no other basis of liability on its part in its capacity as land occupier. See *United States v. Hull*, 195 F.2d 64, 69 (1st Cir. 1952).

The briefs in this case, as well as the findings of the district court, contain a great deal of matter on the subject of "proximate" or "legal" cause. Before we get to the question of legal cause, the defendant's breach of duty must be shown by the plaintiff to be a "cause in fact" of the plaintiff's asserted loss. This involves a finding of fact, of course, and the government seems to maintain that we must necessarily sustain the district judge's finding that the defendant was not a cause in fact of the plaintiff's loss. We do not believe that the district judge could have ever intended to make any such finding. For everybody concedes that the fire that caused the losses in question can be traced back in unbroken sequence to the Heckelville spot fire previously mentioned, which smoldered for a time and perhaps was erroneously thought to be under control, but which ultimately broke loose and spread to the plaintiffs' premises in September of 1951.

Though we have been referred to no Washington case on the point, we may assume the Washington law to be laid down in *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), and in Restatement, Torts § 281(b) (1934), that, for a defendant to be liable for an unintended invasion of an interest of another, it is necessary to find that the conduct of the defendant was negligent with reference to such interest or any other similar interest of the other which is protected against unintentional invasion.

In other words, when the district court finds District Ranger Floe to be initially "negligent," we take it he means not negligent in the abstract, but negligent in the sense that such negligence subjected appellants' property to an unreasonable risk of a fire loss. This is what the district judge seems to have in mind when he says in his Memorandum Opinion:

> "It is also well recognized that small fires in the forest shortly following inception may be readily controlled and suppressed by prompt and thorough action; that such fires easily and rapidly spread and rarely remain small or die out unattended without active control and extinguishment; and that forest fires by the minute are more difficult and dangerous to confine and control as they spread under conditions of wind, heat and low humidity. For these reasons ordinary and reasonable care requires urgent speed, vigorous attack and great thoroughness in reaching and putting out fire in the forest. In the early stages of firefighting action a few minutes' delay, a man or two less than needed, and too little of the right kind of equipment may, any one of them, make the difference between a small fire quickly disposed of with little or no damage and a conflagration of extensive proportions resulting in great loss of life and property."

In amended finding No. IX, the district judge found:

> "On August 6, 1951, at and prior to the time when the Heckelville spot fire occurred, District Ranger Floe knew or should have known that a fire in that area which was not extinguished might burn continuously and progressively and might burn property for many miles in any direction, including westerly and southerly to the Pacific Ocean."

We may also take it, though we have no Washington cases that we can cite, that the State of Washington does not, as does the State of New York, use the doctrine of "proximate cause" somewhat arbitrarily to cut off a liability that would otherwise rest upon a negligent actor. See *Homac Corp. v. Sun Oil Co.*, 258 N.Y. 462, 180 N.E. 172 (1932); *Frace v. New York, Lake Erie & Western R.R. Co.*, 143 N.Y. 182, 38 N.E. 102 (1894).

As District Ranger Floe well knew, the spring and summer of 1951 were among the driest on record in the Soleduck District, and the risk of forest fires was especially severe. The district court's crucial amended finding is as follows:

"XVI.

> "District Ranger Floe and his subordinates, acting within the scope of their duties as officers and employees of the United States, failed to act as promptly, vigorously and continuously as they were required to do in the exercise of ordinary care in attacking the Heckelville spot fire and in attempting to confine it to the 60-acre area. Whether, or at what time and place, the fire might have been contained or suppressed within said area but for such negligence is a matter of speculation and cannot be determined as a reasonable probability under the evidence. It has not been established by a pre-

ponderance of the evidence that had such negligence not existed, the fire would have been contained in the 60-acre area, or that there is any causal relationship between that negligence and the ultimate existence of fire in the 1600-acre area."

It is obvious that when one considers what might have happened had the facts been different from what they were, one necessarily enters into the area of "speculation." The burden of proof is certainly not upon the plaintiff to show that, had the defendant not been negligent at the start, the fire would have been contained within any particular space. Amended finding XVI has within it, therefore, a fundamental error of law.

It may well be, as found by the district court, that the defendant was not thereafter negligent in the "mop-up period." But it is perfectly clear from the court's findings that, had the United States not been initially negligent, the Heckelville spot fire would have been extinguished before it finally spread, as were several other spot fires set by the same locomotive of the Port Angeles and Western Railroad. When the defendant's breach of duty is shown to have brought about the same type of loss, the contemplation of the risk of which made the defendant's conduct negligent, it seems pointless to say that, though the defendant was negligent, his negligence was not the "proximate cause" of the ultimate loss.*

For the reasons above indicated, the plaintiffs in No. 16367 also were entitled to recover against the United States in the stipulated amounts.

Since appellants in No. 16367 will get their judgment against the United States, we suspect that they are

*But see **The Lusitania**, 251 Fed. 715, 732 (S.D.N.Y. 1918).

rather indifferent to what happens to their causes of action against the Port Angeles and Western Railroad Company and against Fibreboard Products, Inc. Nevertheless, we are called upon to decide the liability of these two defendants in No. 16367.

We are not disposed to challenge the district court's finding that, though the Railroad was negligent in allowing some parts of its right of way to fall into an unduly dangerous fire condition, this negligence was not a cause in fact of the setting of the fire in the Heckelville area. Nor do we challenge the district court's finding that the Railroad was guilty of no negligence in the operation of the locomotive which set the Heckelville spot fire. Still, when a fire broke out on the right of way occupied by the railway, even though such fire was set through no negligence of the occupier, certainly the railway had the affirmative duty to use care to see that the fire did not spread beyond its right of way and endanger other interests beyond. As the district court correctly stated the Washington law to be:

> "An owner or occupant of forest land with knowledge of a fire burning on such land, even though started by strangers, must exercise ordinary and reasonable care to prevent spread of the fire to the damage of others. Failure to do so is negligence rendering the landowner or occupant liable for all damage proximately resulting therefrom."

But this duty on the occupier's part is certainly "nondelegable" in the sense that if the railroad makes an agreement with another (here the United States) to furnish this fire protection, the occupier is liable for damages negligently caused by such delegatee. Having held the United States liable for the losses suffered by appellants, we must also hold the Railroad liable.

Similar reasoning would moreover render Fibre-

board Products, Inc., liable for the losses suffered by appellants. The district court found the Forest Service negligent "in its firefighting action during the initial period, August 6-10, in which interval the fire reached Fibreboard lands" and, as we have shown, this initial negligence by the Forest Service was a proximate cause of the losses sustained by appellants.

The judgments of the District Court are vacated and the cases are remanded to that Court with directions to entertain further proceedings not inconsistent with this opinion.

(Endorsed) Opinion Filed Oct. 25, 1960.

Frank H. Schmid, Clerk

APPENDIX B

ORDER OF THE COURT OF APPEALS DENYING PETITIONS FOR REHEARING AND REMANDING

UNITED STATES COURT OF APPEALS
FOR THE NINTH COURT

ARTHUR A. ARNHOLD, et al., *Appellants*, vs. UNITED STATES OF AMERICA, et al., *Appellees*.	No. 16,367
RAYONIER INCORPORATED, a Corporation, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee*.	No. 16,368
	May 10, 1961

UPON PETITIONS FOR REHEARING

Before POPE, MAGRUDER and MERRILL, Circuit Judges.

The several petitions for rehearing are denied.

Calvert Magruder
Charles M. Merrill
United States Circuit Judges

POPE, Circuit Judge.

I would grant the rehearing sought by the appellees for the purpose of permitting further consideration by the court of a contention made in the petition of the United States which appears to me at this time to be a valid one. The petition of the United States makes two points: the first is that our opinion here is out of line with what was said in this court's earlier opinion when the case was first here. Rayonier Incorporated v. United States, 225 F. 2d 642; Arnhold, et al., v. Unit-

ed States, 225 F. 2d 650. In the first of those two opinions language was used to the effect that "liability may not be predicated on conduct occurring before the spread of the fire to the 1600 acre tract." That language was used with respect to the case as it then stood before the court, namely, upon the pleadings only. Subsequently on remand, the case was tried and heard upon a pretrial agreement and order which superseded the prior pleadings; and for that reason I think the point suggesting that we have disregarded the law of the case is not well taken.

However, as our opinion discloses, we had some difficulty in interpreting the findings of the district court and to a degree we modified them or put our own interpretation upon them. Thus we said: "We do not believe that the district judge could have ever intended to make any such finding." Again we said: "In other words, when the district court finds District Ranger Floe to be initially 'negligent', *we take it* he means not negligent in the abstract, but negligent in the sense that such negligence subjected appellants' property to an unreasonable risk of a fire loss. This is what the district judge *seems* to have in mind . . ." (Emphasis mine). We also said: "But it is perfectly clear from the court's findings that, had the United States not been initially negligent, the Heckelville spot fire would have been extinguished before it finally spread. . . ."

Actually the district court said in its findings that although the Forest Service had not exercised reasonable care in its initial attack upon the fire, yet it was not established that "had such negligence not existed the fire would have been contained in the 60-acre area." It seems to me altogether possible that what the district court found was that although the Forest Service did not use the proper degree of care in fighting the initial fire with as many men and with such vigor as

it ought to have done, yet the court found that there was no proof that such failure was actually the cause of the spread of the fire since it was not proven that it might not have spread in any event. See Eckerson v. Ford's Prairie School Dist. No. 11, 3 Wn. 2nd 475, 482, 101 P. 2d 345.

I am therefore of the opinion that in this situation we might well give further consideration to the question whether we ought not to remand the cause to the district court for further clarification of the court's findings. Our interpretation of his finding may possibly be wrong.

(Endorsed) Opinion Filed May 10, 1961.

Frank H. Schmid, Clerk.

APPENDIX C

JUDGMENT OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARTHUR A. ARNHOLD, et al., *Appellants,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 16367

Appeal from the United States District Court for the Western District of Washington, Northern Division.

This Cause came on to be heard on the Transcript of Record from the United States District Court for the Western District of Washington, Northern Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be and hereby is vacated and that said cause be, and hereby is remanded to the said District with directions to entertain further proceedings not inconsistent with the opinion of this court, with costs in this Court in favor of the appellants' Arnhold, et al., and against the appellees Port Angeles and Western Railway, A. R. Truax, Trustee in Reorganization thereof and Fibreboard Products.

It is Further Ordered and Adjudged by this Court that the appellants Arnhold, et al., recover against the appellees Port Angeles and Western Railway, A. R. Truax, and Fibreboard Products for their costs herein expended and have execution therefor.

(ENDORSED) Judgment
Filed and entered October 26, 1960
FRANK H. SCHMID, Clerk

APPENDIX D

STATUTES INVOLVED

16 U.S.C. § 572. **Cooperation between Secretary of Agriculture and public or private agencies in working land under State or private ownership—Payment of expenses by interested parties; work contemplated.**

(a) The Secretary of Agriculture is authorized, where the public interest justifies, to cooperate with or assist public and private agencies, organizations, institutions, and persons in performing work on land in State, county, municipal, or private ownership, situated within or near a national forest, for which the administering agency, owner, or other interested party deposits in one or more payments a sufficient sum to cover the total estimated cost of the work to be done for the benefit of the depositor, for administration, protection, improvement, reforestation, and such other kinds of work as the Forest Service is authorized to do on lands of the United States: *Provided,* That the United States shall not be liable for the depositor or landowner for any damage incident to the performance of such work.

Cooperation where national forests or lands are used by permittees

(b) Cooperation and assistance on the same basis as that authorized in subsection (a) of this section is authorized also in the performance of any such kinds of work in connection with the occupancy or use of the national forests or other lands administered by the Forest Service.

Disposition and availability of moneys; advancements; adjustments

(c) Moneys deposited under this section shall be covered into the Treasury and shall constitute a special fund, which is made available until expended for payment of the cost of work performed by the Forest Service and for refunds to depositors of amounts deposited by them in excess of their share of said cost: *Provided,* That when deposits are received for a number of similar types of work on adjacent or overlapping areas, or on areas which in the aggregate are determined to cover a single work unit, they may be expended on such combined areas for the purposes for which deposited, in which event refunds to the depositors of the total amount of the excess deposits involved will be made on a proportionate basis: *Provided further,* That when so provided by written agreement payment for work undertaken pursuant to this section may be made from any Forest Service appropriation available for similar types of work, and reimbursement received from said agencies, organizations, institutions, or persons covering their proportionate share of the cost and the funds received as reimbursement shall be deposited to the credit of the Forest Service appropriation from which initially paid or to appropriations for similar purposes currently available at the time of deposit: *Provided further,* That when by the terms of a written agreement either party thereto furnishes materials, supplies, equipment, or services for fire emergencies in excess of its proportionate share, adjustment may be made by reimbursement or by replacement in kind of supplies, materials, and equipment consumed or destroyed in excess of the furnishing party's proportionate share. Mar. 3, 1925, c. 457, § 1, 43 Stat. 1132; Apr. 24, 1950, c. 97, § 5, 64 Stat. 83.

Revised Code of Washington § 76.04.400 Cooperative Protection. When any responsible protective agency or agencies composed of timber owners other than the state shall agree to undertake systematic forest protection in cooperation therewith and such cooperation shall appear more advantageous to the state than the maintenance of the independent system provided elsewhere by law, the state forester may, with the approval of the state board of forest commissioners, designate suitable areas to be official cooperative districts and substitute thereto whenever necessary, in place of the county wardens elsewhere provided by law, such district wardens, with such district headquarters and duties, as may be agreed upon by him and by the cooperating agencies to render such cooperation most effective. He may also cooperate in the compensation of such wardens, or in the payment of other expenses for the prevention and control of fire in such official fire districts, to such extent as the board of forest commissioners may deem equitable on behalf of the state, and claim for such payments shall be approved and paid in the manner prescribed for claims outside such cooperative districts. [1917 c. 105 § 5; RRS § 5808.]

Revised Code of Washington § 76.04.060 Wardens — Appointment — Duties — Compensation. The state supervisor of forestry shall, subject to the approval of the director of the department of conservation and development, have power to appoint within any region or district in this state where there is timber requiring protection, one or more wardens for all or any portion of the period during which the said supervisor deems that forest fire dangers exist.

The said supervisor may, subject to the approval of the said director, and at such times and in such localities as he deems the public welfare demands, employ one or

more wardens whose duty it shall be to examine deforested lands of the state, and ascertain if such lands are chiefly valuable for agriculture, or if they are chiefly valuable for timber growing, with a view to reforestation. The said wardens, shall, under the direction of the said supervisor engage in the discovery of inflammable materials, and cause, or assist in the burning of such material at such times as the burning can be done with a minimum of danger to adjacent timber, or other property. The said wardens, under the direction of the said supervisor, shall report any trespass and illegal cutting upon state timber lands, coming to his notice, and report the same to the state land commissioner.

The said supervisor shall have power to temporarily suspend any warden or ranger who may be incompetent or unwilling to discharge properly the duties of his office, and to appoint his successor temporarily, until his action shall be passed upon by the said director.

The wardens shall make their headquarters at such place as the said supervisor shall determine, and upon request of said supervisor to the county commissioners of any county, such wardens shall be furnished with suitably equipped office quarters in the county court house, said quarters to be designated by said county commissioners.

The authority of the wardens respecting the prevention, suppression and control of forest fires, summoning, impressing or employing help, or making arrests for the violation of this act, may extend to any part of the state.

The salaries and necessary expenses of all wardens, together with all wages and expenses incurred for help and assistance in forest fire protection shall be fixed by the said director, the wages and salaries to be based on

but not to exceed going wages and salaries for similar work.

All accounts of the wardens shall be submitted to the said supervisor, as well as all bills for forest fire protection authorized by the wardens.

All wardens and rangers shall render reports to the said supervisor on such blanks or forms, or in such manner, and at such times as may be ordered, giving a summary of how employed, the area of county visited, expenses incurred, and such other information as may be called for by the said supervisor. [1937 c. 97 § 1; 1923 c. 184 § 2; 1921 c. 102 § 1; 1911 c. 125 § 5; RRS § 5785. Prior: 1905 c. 164 § 5.]

Revised Code of Washington § 76.04.070 Further duties of wardens. Each warden shall be at all times under the direction and control of the supervisor of forestry, and shall perform such other duties at such times and places as he may direct.

It shall be the duty of wardens to post over the forest areas notices of warning giving the date of the closed season as provided for in RC W76.04.150, and copies of all such laws and rules as they may be directed to post by the supervisor of forestry.

They shall investigate all fires and report all of a serious or threatening character to the supervisor of forestry immediately. They shall patrol heir districts; visit all parts of roads and trails, and frequented places and camps as far as possible, warn campers or other users of fire, see that all locomotives are provided with spark arresters, and with adequate devices for preventing the escape of fire or live coals from ash pans and fire boxes, in accordance with the law; extinguish small or smouldering fires, and set back-fires to control fires; summon, impress and employ help in controlling fires,

and see that all laws for the protection of forests are enforced, and arrest and cause to be prosecuted all offenders. [1933 c. 68 § 1; 1911 c. 125 § 6; RRS § 5786. Prior: 1905 c. 164 § 6.]